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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SAMUEL ORONA, Plaintiff and Respondent, v. ORQUIDEA MARIA ORONA, Defendant and Appellant.	B212293 (Los Angeles County Super. Ct. No. KD068313)

APPEAL from an order of the Superior Court for the County of Los Angeles. Susan Lopez-Giss, Judge. Reversed and remanded with directions.

Law Offices of Mark J. Warfel and Mark J. Warfel for Defendant and Appellant.

The Law Firm of Fox and Fox, Frank O. Fox and Claire S. Fox for Plaintiff and Respondent.

SUMMARY

This case involves the modification of spousal and child support orders sought by the payor spouse (the husband). The question is whether the trial court properly imputed income of $2,348 per month to the payee spouse (the wife), reducing monthly spousal support from $1,148 to zero and reducing monthly child support by $456 per month. Based on the wife's income and expense declaration (made under penalty of perjury) that she had monthly expenses of $4,734 and that none of her expenses was paid by others, and relying on *In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28 (*Calcaterra*), the court imputed monthly income of $2,348 to the wife, observing that "[i]f she spends it, she's got it."

We conclude the trial court abused its discretion, because (1) expenses paid with borrowed money are not expenses "paid by others," (2) the evidence showed only that the wife borrowed money, not that she had income, and (3) *Calcaterra* does not support the proposition that income may be imputed based solely on a purportedly false statement and in the absence of any substantial evidence of income. However, income properly may be imputed to a spouse based on her earning capacity, if consistent with the best interests of the children. (Fam. Code, § 4058, subd. (b).)[1] Accordingly, the case will be remanded to the trial court for a reconsideration of the wife's total financial picture and a redetermination of whether and in what amount, if any, income should be imputed to the wife based on her earning capacity.

LEGAL, FACTUAL AND PROCEDURAL BACKGROUND

To facilitate an understanding of the facts in this case, some background legal principles applicable to child and spousal support orders are helpful.

1. The family law court uses an algebraic formula to calculate the presumptively correct amount of child support under a statewide uniform guideline contained

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[1] Further statutory references are to the Family Code unless otherwise specified.

in the Family Code.[2] (§ 4055; *In re Marriage of Corman* (1997) 59 Cal.App.4th 1492, 1498 (*Corman*).) The court first determines each parent's annual gross income, which is defined expansively in section 4058, subdivision (a).[3] (*Corman*, at p. 1498.)

2. Section 4058, subdivision (b) provides that "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."
3. Funds derived from loans are generally not considered income for child support purposes. In *In re Marriage of Rocha* (1998) 68 Cal.App.4th 514 (*Rocha*), the court held that a student loan, later subject to repayment, is not

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[2] "The DissoMaster is one of two privately developed computer programs used to calculate guideline child support as required by section 4055, which involves, literally, an algebraic formula." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523, fn. 2.) The computer programs "determine child support according to the statutory formula and calculate temporary spousal support as provided by local rules for the ordinary case. The benefit of the programs is that they enable a family law judge to input appropriate factual information about the income of the parties and have temporary spousal support computed in accordance with local rules, automatically taking into account the tax consequences of the order to each party." (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 5, fn. 3.)

[3] "The annual gross income of each parent means income from whatever source derived, except as specified in subdivision (c) and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] (3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts." (§ 4058, subd. (a).) Subdivision (c) excepts from annual gross income "any income derived from child support payments actually received" and other items not relevant here. (§ 4058, subd. (c).)

income within the meaning of section 4058. (*Id.* at p. 516.) Thus the court reversed the trial court's finding that the loans received in excess of actual school expenses were income for purposes of assessing child support. (*Ibid.*) The court of appeal reasoned that all the items listed as sources of income in section 4058 "represent a form of income where there is no expectation of repayment or reimbursement." (*Id.* at p. 517; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 6:208.3, pp. 6-98 to 6-98.1 [reasoning in *Rocha* "likely would apply to any ostensible 'income' item that is subject to a 'reasonable expectation' of repayment – e.g., *any kind of loan proceeds* probably should not be included in the guideline annual gross income computation"].)[4]

4. The same is true of one-time gifts and inheritances; they normally are not gross income for child support purposes. (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:209, p. 6-98.2, citing cases.)
5. "If a parent is unwilling to work despite the ability and the opportunity, earning capacity may be imputed." (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1338 (*LaBass*).) A three-pronged test "must be met before the trial court may utilize a parent's earning capacity rather than actual income in computing child support." (*Id.* at p. 1337.) Earning capacity is composed of "'"(1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and

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[4] See also *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332, 333 (*Loh*) ["section 4058 defines 'gross income' with language that was 'lifted straight from the definition of income in'" the Internal Revenue Code; "much of the jurisprudence governing determination of income has followed, or been consistent with, basic income tax law principles"]; cf. *Asfaw v. Woldberhan* (2007) 147 Cal.App.4th 1407, 1425 [depreciation of rental property may not be deducted from annual gross income in calculating child support].

meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire."'" (*Id.* at pp. 1337-1338.)

6. In *Calcaterra*, the court of appeal held, in a case involving modification of a child support order, that "[w]here the trial court recognizes deception, it may draw adverse factual inferences and even refer the matter for perjury prosecution." (*Calcaterra, supra*, 132 Cal.App.4th at p. 31.) In *Calcaterra*, the father appealed from an order increasing his child support obligation from $350 per month to $1789 per month, arguing (among other things) that the evidence was insufficient to support the trial court's determination of his income. The trial court had expressly found that the father (and the mother) committed perjury, intentionally misrepresenting their incomes and expenses. (*Id.* at p. 33.) The father testified that his gross income for the year was $30,483 and his tax returns showed similar amounts. The trial court found he had *monthly* income of almost $28,000 (*id.* at p. 34), relying on information in a loan application made by the father on one of his properties. The court of appeal concluded that "the presumption of correctness of recent tax returns may be rebutted by a statement of income on a loan application where, as here, the parent owns his own business." (*Id.* at pp. 34-35 ["in view of the huge discrepancy between the tax returns, the … loan applications, his income and expense declaration, and testimony, the trial court was not required to accept the statement of income on the tax returns"].)[5]

With these legal principles in mind, we turn to the case before us.

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[5] The father's "income and expense declaration just doesn't 'add up.' He owns a Unocal 76 gas station, two residences, and 28 apartments. His labors and these properties allegedly produce a net income of $1,714 per month. This declaration simply does not have the 'ring of truth.'" (*Calcaterra, supra*, 132 Cal.App.4th at p. 36.)

In July 2006 Samuel Orona (Samuel) filed a petition for dissolution of his marriage to Orquidea Maria Orona (Maria).[6] The Oronas have two children, a son born in 1992 and a daughter born in 1996. The daughter is autistic, and the mother has not worked outside the home since 1998.

In December 2006, the court made various orders, including custody and visitation, child support, spousal support and property orders. Samuel was ordered to pay Maria monthly child support of $2,077 and monthly spousal support of $1,148, beginning as of August 1, 2006. The court found Samuel's monthly wages to be $6,768, and considered only those wages as income, accepting Samuel's representation that he was discontinuing any business activities outside of his employment. Maria was responsible for paying the mortgage on the family residence while she and the children resided there.

Some 16 months later, Samuel sought a modification of the child and spousal support orders, asking the court to reduce the child support and terminate the spousal support. He said he had had a significant reduction in earnings because he now worked a day shift and no longer received the night shift differential in pay. He said he did not make enough money to pay the combined support order from his earnings, and it was impossible for him to rent an apartment or a room in a house.[7] He asked the court to impute income to Maria, who could "obtain some part-time employment" but was "unwilling to work." Samuel explained that their autistic daughter was "involved in special education. Her mother drops off our daughter at her school at 8:30 a.m. and picks her up at approximately … 2:30 p.m. The school district offers a special bus that can pick up our daughter at 7:30 a.m. and would drop her off at 3:00 p.m. This would afford

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[6] As is customary in family law cases, we refer to the parties by their given names for purposes of clarity.

[7] Samuel said he continued to work at his job at Huntington Memorial Hospital, but was no longer physically able to "work[] swap meets" as he had done during the marriage to supplement the family income. Samuel said he had lived in his van from January to June 2007, lived with a friend from June to December 2007, and in December rented a garage, which was "the only place that I have and can afford at the present time."

my spouse an opportunity to obtain some part-time employment . . . . I am mindful that our daughter occasionally requires some intervention by the mother before the end of the school day. However, this is infrequent and if the school was aware of the job hours that could be obtained by the mother, they would work around this problem." [8] Samuel's income and expense declaration listed his average monthly income as $5,278, and average actual expenses as $1,347. His 2007 tax return showed total income of $63,570, most of which consisted of wages ($63,217).[9]

Maria's responsive declaration, filed May 23, 2008, took issue with many of Samuel's averments about his physical disability, periods of homelessness, decrease in salary, and so on. She stated she was unable to work because of her daughter's needs. She said the school calls her on an emergency basis from one to three times a month to come to the school because of the daughter's problems. She meets with her daughter's teacher about once a month and with the daughter's several therapists about once a month; she attends workshops to learn about caring for her daughter about twice a month; and because she cannot tell in advance when these meetings would occur, she was "unable to commit to a schedule of work at this time." She also had to do marketing, housework and other errands while her daughter attends school, "as she requires my constant attention when she is at home."[10] Maria asserted that Samuel "has no personal

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[8] Samuel also asserted that he was informed that Maria would be eligible to receive $1,000 monthly from the County of Los Angeles for providing "in-home support services" to a child with disabilities. He also asserted that Maria could obtain $600 a month in social security benefits for the support needs of their daughter, but that Maria refused to attempt to do so after having been denied benefits in 1998.

[9] Maria's 2007 tax return showed total income of $11,833, almost all of it ($11,480) spousal support.

[10] Maria stated that her daughter "is unable to walk to the bus stop alone and get on the bus. She is considered 'low functioning autistic' and I would be subject to civil and criminal penalties if I left her alone. Our son … attends a school in another direction, at the same starting time as [the daughter]. I am also required to be present when [the daughter] returns from school. Due to her condition, I cannot be late or skip a day under

knowledge of what our daughter requires, what the school is willing to do, or what is required for our daughter's care on a 24/7 basis. He was rarely home during the marriage, and not involved with the details of [the daughter's] care."

Maria's declaration also stated that Samuel (as he admitted) was behind on support, and "I am borrowing money each month just to stay afloat. I had to borrow $4,000 from my father to keep the house out of foreclosure. The mortgage is now paid through May of 2008. . . . I borrowed another approximately $1,500 from my father in August of 2006 to pay the mortage, because Sam did not start sending in payments for over a month." Maria's declaration also stated that she "had to borrow money on a Sears MasterCard account, which now has a balance of $9,868.18, all but $3,000 of which has been for living expenses, incurred since August of 2006. The other card is a Target card is $3,940.22, which has also been incurred since August of 2006 for living expenses. The AAA card balance is approximately $4,000, also for living expenses." Maria's income and expense declaration, dated May 15, 2008, showed average monthly income (all spousal support) of $669, and average actual monthly expenses of $4,694. (Several months later, Maria filed another income and expense declaration, dated August 15, 2008, showing total actual monthly expenses of $4,734.)[11] Despite these loans, on the on the May 15, 2008 and August 15, 2008 printed income and expense declaration form, Maria put -0- under the line calling for "Amount of expenses paid by others."

On June 4, 2008, Samuel replied by filing a declaration from Brenda Diaz, a woman with whom he had a relationship and resided until December 2007. Diaz was

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any circumstance. While I am highly motivated to care for my daughter, and consider it a privilege, this severely limits my ability to work."

[11] The total consisted of monthly expenses as follows: $1,228 (mortgage); $300 (property taxes); $80 (homeowner's insurance); $120 (maintenance and repair); $250 (health-care costs not paid by insurance); $800 (groceries and household supplies); $40 (eating out); $400 (utilities); $140 (telephone and e-mail); $40 (laundry and cleaning); $160 (clothes); $28 (education); $360 (auto expenses and transportation); $30 (charitable contributions); and $758 (installment payments on credit cards and a car loan).

employed at a pre-school facility in Glendora. Samuel had told her that Maria would require some kind of employment, and "[c]oincidentally" a position as a pre-school teacher at her facility had become available. Diaz gave Samuel an application on May 24, 2008. The position involved a 40-hour week with work from 9:00 a.m. to 6:00 p.m. and "allowed flexibility for the needs of Mrs. Orona in dealing with situations involving her daughter." Diaz stated that Maria declined the position, indicating "that she felt awkward in that she knew of my former relationship with her husband."

The hearing on Samuel's modification request occurred on August 27, 2008. At the hearing, Samuel presented more recent pay stubs. These showed year-to-date wages as of July 13, 2008 of $43,589.75. Counsel for Maria pointed out that this reflected almost exactly the same amount of wages as appeared in the initial support orders, showing there was "no drop in income." The court agreed with counsel on this point, but said: "I have more problems with [Maria]. What is she doing? She's not working? She's not doing anything?" Counsel responded that "[i]f you think that caring for a low functioning, autistic child who can't get to the bus on her own, can't feed herself, can't take care of her basic necessities is doing nothing, then I suppose my client is doing nothing." The court asked Maria what she did while the daughter was in school from 8:00 a.m. to 2:30 p.m., and why she did not work. Maria explained that she had to meet with occupational therapists and speech therapists at various times. The court said, "I need to know what you do every day." Maria replied that "I do as much as I can when my daughter is not there because she requires 24/7. So in other words, the housework, everything that needs to be done has to be done before my daughter is there, preparing the foods for her. She's a 24/7 job." The court asked Samuel if he disagreed with that, and he did. He said that Maria had "ample time to work," and when they were married and had an eBay business, "she volunteered to help me when she wanted to stay home and care for our daughter. Gradually, she left it all to me," but she didn't do so because she was taking care of their daughter, but rather "[s]he would be a caretaker for her mom," and "[s]he would go visit her mom in Alhambra."

The court then asked Maria how she paid her expenses of $4,734 a month. Maria answered:

> "Well, I've had to open credit card accounts in order to be able. I've had to borrow money from my father. Right now our house is in default. My dad has been the one backing us up from the very beginning even when we first bought our home. It has been just borrowing money."

The court then began to decide the amounts that should be used for the DissoMaster support calculation. While Samuel's income remained unchanged, the court turned to Maria's income:

> "THE COURT: She has no income coming in at all?
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> "MR. LOYA [Samuel's counsel]: We would ask the court –
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> "MR. WARFEL [Maria's counsel]: Right. Her father has loaned her some money to keep the house out of foreclosure.
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> "THE COURT: How much money is that?
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> "[MARIA]: He has – well –
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> "THE COURT: He obviously loans you money every month.
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> "[MARIA]: April, our house was supposed to go into foreclosure.
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> "THE COURT: How much has your dad given you?
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> "[MARIA]: $4,000 in April. Before my – August of 2006, it was about another 1500.
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> "THE COURT: Here's the problem, Mr. Warfel. I'm going to tell you, and you are not going to like it. We have a case called *Calcaterra*. I have an income and expense declaration that is under penalty of perjury by your client that indicates her actual expenses are $4,734. I'm putting that amount in [as income].
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> "MR. LOYA: Will the court impute minimum wage to [Maria]?

"THE COURT: I'm imputing $4,734.

"MR. WARFEL: You should deduct the support she's receiving at the very least.

"THE COURT: I'm putting 4,734.

"MR. WARFEL: Your Honor, if she's getting it from child support, it is against the law to count that as income, notwithstanding *Calcaterra*. [12]

"THE COURT: Is that what she's including as her income? I will make it 4,000.

"MR. WARFEL: Your Honor, it is her expenses including the money she gets from support.

"THE COURT: I'm not arguing with you, Mr. Warfel. She's indicating under penalty of perjury this is what she makes every month.

"MR. WARFEL: No, she's not. She's saying that is what she spends.

"THE COURT: If she spends it, she's got it. I'm taking 700 off."

Counsel ultimately persuaded the court that it could not count the monies Samuel paid in support (which he testified was at least $2,000 a month) as income to Maria, but the court insisted on imputing the remaining $2,700 of Maria's $4,734 in actual expenses as income, resulting in "child support of $1,622 a month and no spousal

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[12] "Annual gross income does not include any income derived from child support payments actually received …." (§4058, subd. (c).) Also, "spousal support received from a party to the child support proceeding does not constitute gross income for purposes of determining the presumptively correct guideline child support" under sections 4055 and 4058. (*Corman, supra*, 59 Cal.App.4th at p. 1495.)

support."[13] Counsel then requested, and received, an opportunity to question Maria "about where she gets that money." Maria testified that:

- The installment payment on her Sears credit card was $340, but she hadn't paid it since March 2008; she responded affirmatively when her counsel asked if she "included that … in the interest of being completely forthcoming trying to put forth all of your debts and what the payment amount is supposed to be?" She said her actual expenses, "as of now not paying that," would be $340 less. The same was true for a visa card with a $200 installment payment.
- Maria said she was borrowing money from her father to pay the mortgage, and that payment, with taxes and insurance, was more than $1,560. Counsel asked, "In other words, money is being paid by your father," and Maria said, "That's correct." The court then interjected: "Counsel, I want to tell you something. Before you go on any further, the amount of expenses paid by others is zero, under penalty of perjury." Counsel said he understood and then questioned Maria about money she had borrowed from her father, her sister, and a friend.[14] Counsel asked Maria: "So even though you borrowed that money, you are the one who is actually writing the check to pay those expenses?" and Maria responded, "Absolutely." Maria testified that she did not include those borrowings as an installment debt on her declaration.

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[13] Maria's counsel then stated, apparently in a sarcastic tone of voice: "Well, Your Honor, I'm sure that will be excellent for this child who's autistic, and I appreciate your bringing the case [*Calcaterra*] to our attention. I think we haven't had an opportunity for [Maria] to explain where her expenses were. I would appreciate an opportunity to ask her some further questions about where she gets that money." The court, after noting counsel's sarcasm, said that it "brought the case [*Calcaterra*] up because it is the law."

[14] Maria testified she borrowed $4,000 from her father on April 6, 2008, and "ha[d] a copy of the letter and the check"; she recently borrowed a thousand dollars from her sister and $260 from a friend.

- Maria was asked, "Has this [her expense declaration] been your – an estimate of your average actual expenses over the last year?" and responded, "Approximately." She testified that as to current actual expenses, she was no longer able to spend $160 a month on clothes for the children and now spent "if anything, $25. That's it." She also said she was not able to make any charitable contributions (listed as $30 per month on the declaration) over the last three months.

The court then stated:

> "All right. The court finds that … [Maria] filled out an income and expense declaration that indicated her average monthly expenses are $4,734. The court is going to credit that amount of money with the [$928.25] received twice a month [from Samuel] for a total of [$1856.25] plus the fact that $340 was paid in March and $200 was paid in March for a master card and a visa card. [¶]. . . [¶] $2,396 [$1,856 + $340 + $200] will be credited from the $4,734 claimed as expenses, leaving a balance of $2,348.[15] Based on the fact that [Maria] indicated that none of these expenses were paid by others and that while I understand she may have gotten some loans from individuals, these actual expenses were just testified by her to be actual expenses averaged over the last year."

When used in the DissoMaster calculation of guideline support, the amounts stated by the court resulted in a reduction in Samuel's child support payments from $2,077 to $1,621 per month and a reduction in spousal support from $1,148 per month to zero. The court's order was filed on October 1, 2008, and this timely appeal followed.

DISCUSSION

A trial court's decision to grant or deny a modification of a support order will ordinarily be upheld on appeal unless an abuse of discretion is shown. (*Calcaterra, supra*, 132 Cal.App.4th at p. 34.) A reversal will be ordered """"only if prejudicial error is found after examining the record of the proceedings below."""" (*Ibid.*) When the trial

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15 There appears to be a $10 discrepancy in the calculation ($4,734 minus $2,396 equals $2,338).

court's factual findings are challenged, our review is governed by established principles on the existence of substantial evidence in support of the findings. (*Ibid.*) An appellate court "indulges every intendment in favor of the judgment, and assumes the trial court found every essential fact to support the judgment. The task of the appellate court is limited to searching the record for any substantial evidence which will support the judgment." (*In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 515.)

The court in this case imputed $2,348 in monthly income to Maria. The imputation of income was not based on Maria's earning capacity, as permitted by section 4058, or on any other evidence of income, but instead was based on Maria's statement, under penalty of perjury, that her actual expenses were $4,734 per month and the amount of those expenses "paid by others" was zero. In other words, the court concluded that to the extent Maria spent money on expenses, she had income ("[i]f she spends it, she's got it"). This was erroneous as a matter of law.

First, we do not think that, in common parlance, expenses paid with borrowed money are necessarily "expenses paid by others."[16] The court was apparently concerned about Maria's statement, under penalty of perjury, that the amount of her expenses paid by others was zero. It appears that the court failed to consider Maria's accompanying declaration, also made under penalty of perjury, which stated that she was "borrowing money each month just to stay afloat" and identified her loans with particularity. (Cf. *In re Marriage of McQuoid* (1991) 9 Cal.App.4th 1353, 1360 [rejecting husband's argument that since wife's mother was subsidizing wife and children's living expenses, he had no support obligation for the value of that subsidy].)

Second, there was no evidence of income to support the court's imputation of income. While the Family Code defines gross income expansively, income generally does not include borrowed money or one-time gifts. While the trial court was justified in

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[16] We have examined the printed "Income and Expense Declaration" form and do not find it exactly clear in this regard. It is not obvious that Item 13s, "Amount of expenses paid by others," would call for the respondent to include loans.

concluding that Maria's father "obviously loans [Maria] money every month," loans are not income, and there was no evidence that Maria had been relieved of her obligation to repay those funds. (See *Rocha, supra,* 68 Cal.App.4th at pp. 516-517; Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:208.3, pp. 6-98 to 6-98.1 ["*any kind of loan proceeds* probably should not be included in the guideline annual gross income computation"].)

Third, section 4058 specifically permits the court to "consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) But, although Samuel asked the court to do so, that is not what the trial court did. No substantial evidence was presented as to the earning capacity factors in the three-pronged test which "must be met before the trial court may utilize a parent's earning capacity rather than actual income in computing child support." (*LaBass, supra,* 56 Cal.App.4th at pp. 1337-1338 [earning capacity includes "such factors as age, occupation, skills, education, health, background, work experience and qualifications" and an employer who is willing to hire].) The only evidence (and the court did not allude to it) consisted of Samuel's declaration that Maria could obtain some part-time employment and the declaration from Samuel's former girlfriend that a full-time, 9:00 a.m. to 6:00 p.m. position was available at the pre-school facility where she taught, for which she understood from information given her by Samuel that Maria would be qualified. Even if this evidence sufficed to show Maria's earning capacity, the court was also required to consider whether such employment would be consistent with the best interests of the children. The trial court did not address these points.[17]

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[17] Samuel argues that "the trial court opined that [Maria] had both the ability and opportunity to work," and refers to an "implied finding that imputing earning capacity to [Maria] is in [the] children's best interest …." The record does not support Samuel's claim. Although the court questioned Maria about why she did not work, the transcript shows the trial court imputed income based only on Maria's declaration of expenses and did not address either her ability and opportunity to work or whether her employment would be in the children's best interest. Indeed, Samuel's brief itself asserts that the

Fourth, the only other evidence of Maria's income was her tax return, which, like her income and expense declaration, showed no income other than spousal support. (See *Loh, supra*, 93 Cal.App.4th at p. 332 ["[a] parent's gross income, as stated under penalty of perjury on recent tax returns, should be presumptively correct"].)

Samuel argues that because Maria did not request a statement of decision, she "should not be able to attack the trial court's determination of the controverted issues," and "every essential fact necessary to sustain the lower court's order will be implied." We know of no authority for implying fact findings in contradiction of the trial court's clear statement, on the record, of the basis for its decision. And, in any event, the judgment must be supported by substantial evidence. (*In re Marriage of Jones, supra*, 222 Cal.App.3d at p. 515.) As we have seen, there are no facts supporting an "implied finding" that Maria had earning capacity of $2,348 per month.

In the end, the trial court's imputation of income to Maria was based solely on the *Calcaterra* case, of which the court said, "it is the law." Indeed it is, but it does not permit the court to impute income without evidentiary support.[18] Certainly the court may draw adverse factual inferences when it finds a party is lying, but those inferences must

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court "properly imputed income to [Maria] based on her disclosed 'actual expenses' [Maria] paid each month."

[18] In *Calcaterra*, where the court found intentional misrepresentations of income and expenses by both father and mother, there was evidence of the father's actual income in a loan application he apparently signed. (*Calcaterra, supra*, 132 Cal.App.4th at pp. 33, 34-35.) Meanwhile, the mother testified that her income was $2,600 per month, but the court found her annual income was $72,000 based on her average monthly bank deposits of $6,000. (*Id.* at p. 33.) (The evidence showed the mother had two teaching credentials and a doctorate in clinical psychology. (*Ibid.*)) The trial court rejected the father's contention that the court should have imputed monthly income to mother of $9,000 based on earning capacity, rather than $6,000 based on the monthly bank deposits. (*Id.* at p. 37.) The court of appeal stated that the trial court had imputed income based on earning capacity (*id.* at p. 37) and held that based on the bank deposits, it did not abuse its discretion in doing so. The mother had testified that she was on complete disability, could not work full time, was not a licensed clinical psychologist, and could not get a job as a registered psychologist assistant because of the absence of jobs.) (*Id.* at pp. 37-38.)

necessarily be tied to evidence in the record; the court cannot simply assume a spouse has income based solely on his or her statement of expenses (and in contradiction of accepted principles of gross income).

In sum, while the court is free to reject an income and expense declaration it finds perjurious and may, as in *Calcaterra*, use other substantial evidence of a spouse's income in its place, here the court had no evidence of income to Maria or of her earning capacity in lieu of income or any evidence she was lying. The only evidence was that she was borrowing money from her father and others. As we have observed, a fair reading of the income and expense declaration is that loans from a relative need not be disclosed. Even if the form is ambiguous, the evidence before the court did not support an inference that Maria was lying.

We reiterate that the court may impute income based on Maria's "earning capacity … in lieu of [her] income, consistent with the best interests of the children." (§ 4058, subd. (b).) But the court must do so based on evidence of her ability and opportunity to work, consistent with the best interests of the children.

DISPOSITION

The order is reversed and the matter is remanded for redetermination consistent with the principles expressed in this opinion. Orquidea Maria Orona shall recover her costs on appeal.

MOHR, J. *

We concur:

RUBIN, Acting P. J. FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.